

David Krieger, Esq.
Nevada Bar No. 9086
HAINES & KRIEGER, LLC
5041 N. Rainbow Blvd.
Las Vegas, Nevada 89130
Phone: (702) 880-5554
FAX: (702) 967-6665
Email: dkrieger@hainesandkrieger.com

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

**TIMOTHY TOTH and GARY
HALL, INDIVIDUALLY AND ON
BEHALF OF ALL OTHERS
SIMILARLY SITUATED,**

Plaintiff,

v.

STELLAR RECOVERY, INC.,

Defendant.

Case No.: 2:13-cv-01276-LDG-GWF

CLASS ACTION

**FIRST AMENDED COMPLAINT
FOR DAMAGES AND
INJUNCTIVE RELIEF PURSUANT
TO THE TELEPHONE
CONSUMER PROTECTION ACT,
47 U.S.C. § 227, ET SEQ.**

JURY TRIAL DEMANDED

INTRODUCTION

1. TIMOTHY TOTH (“TOTH”) and GARY HALL (“HALL”) (jointly referred to as “Plaintiffs”) bring this Class Action Complaint for damages, injunctive relief, and any other available legal or equitable remedies, resulting from the illegal actions of STELLAR RECOVERY, INC. (“Defendant”), in negligently contacting Plaintiff on Plaintiff’s cellular telephone, in violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227 et seq., (“TCPA”), thereby invading Plaintiffs’ privacy. Plaintiffs allege as follows upon personal knowledge as to himself and his own acts and experiences,

1 and, as to all other matters, upon information and belief, including
2 investigation conducted by their attorneys.

3 2. The TCPA was designed to prevent calls and messages like the ones
4 described within this complaint, and to protect the privacy of citizens like
5 Plaintiff. “Voluminous consumer complaints about abuses of telephone
6 technology – for example, computerized calls dispatched to private homes –
7 prompted Congress to pass the TCPA.” *Mims v. Arrow Fin. Servs., LLC*, 132
8 S. Ct. 740, 744 (2012).

9 3. In enacting the TCPA, Congress intended to give consumers a choice as to
10 how creditors and telemarketers may call them, and made specific findings
11 that “[t]echnologies that might allow consumers to avoid receiving such
12 calls are not universally available, are costly, are unlikely to be enforced, or
13 place an inordinate burden on the consumer. TCPA, Pub.L. No. 102–243,
14 § 11. Toward this end, Congress found that
15

16 [b]anning such automated or prerecorded telephone calls to the
17 home, except when the receiving party consents to receiving the
18 call or when such calls are necessary in an emergency situation
19 affecting the health and safety of the consumer, is the only
20 effective means of protecting telephone consumers from this
nuisance and privacy invasion.

21 *Id.* at § 12; see also *Martin v. Leading Edge Recovery Solutions, LLC*, 2012 WL
22 3292838, at* 4 (N.D.Ill. Aug. 10, 2012) (citing Congressional findings on TCPA’s
23 purpose).
24

25
26 4. Congress also specifically found that “the evidence presented to the
27 Congress indicates that automated or prerecorded calls are a nuisance and an
28 invasion of privacy, regardless of the type of call....” *Id.* at §§ 12-13. See

also, *Mims*, 132 S. Ct. at 744.

5. As Judge Easterbrook of the Seventh Circuit recently explained in a TCPA case regarding calls to a non-debtor similar to this one:

The Telephone Consumer Protection Act ... is well known for its provisions limiting junk-fax transmissions. A less-litigated part of the Act curtails the use of automated dialers and prerecorded messages to cell phones, whose subscribers often are billed by the minute as soon as the call is answered—and routing a call to voicemail counts as answering the call. An automated call to a landline phone can be an annoyance; an automated call to a cell phone adds expense to annoyance.

Soppet v. Enhanced Recovery Co., LLC, 679 F.3d 637, 638 (7th Cir. 2012).

JURISDICTION AND VENUE

6. This Court has federal question jurisdiction because this case arises out of violation of federal law. 47 U.S.C. §227(b); *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740 (2012).
7. Venue is proper in the United States District Court for the District of Nevada pursuant to 18 U.S.C. § 1391(b) because Defendant is subject to personal jurisdiction in the County of Clark, State of Nevada.

PARTIES

8. TOTH is, and at all times mentioned herein was, a citizen and resident of the State of Nevada. TOTH is, and at all times mentioned herein was, a “person” as defined by 47 U.S.C. § 153 (10).
9. HALL is, and at all times mentioned herein was, a “person” as defined by 47 U.S.C. § 153 (10).
10. Plaintiffs are informed and believes, and thereon allege, that Defendant is, and at all times mentioned herein was, a corporation whose State of Incorporation and principal place of business is in the State of Florida. Defendant, is and at all times mentioned herein was, a corporation and is a

1 “person,” as defined by 47 U.S.C. § 153 (10). Defendant provides loans to
2 hundreds of thousands of consumers. Plaintiff alleges that at all times
3 relevant herein Defendant conducted business in the State of California and
4 in the County of San Diego, and within this judicial district.

5 **FACTUAL ALLEGATIONS**

6 11. At all times relevant, Plaintiffs are, and at all times mentioned herein were, a
7 “person” as defined by 47 U.S.C. § 153 (10).

8 12. Defendant is, and at all times mentioned herein was, a corporation and a
9 “person,” as defined by 47 U.S.C. § 153 (10).

10 13. At all times relevant Defendant conducted business in the State of Nevada
11 and in the County of Clark, within this judicial district.

12 14. At no time did Plaintiffs ever enter into a business relationship with
13 Defendants.

14 15. Plaintiffs did not provide Plaintiffs’ cellular telephone numbers to Defendant
15 through any medium at any time.

16 16. Defendants obtained Plaintiffs’ contact information through unknown
17 means.

18 **Calls to Plaintiff Timothy Toth**

19 17. On good information and belief, Defendant began contacting TOTH with an
20 automatic telephone dialing system (“ATDS”) as defined by 47 U.S.C. §
21 227(a)(1) beginning in April 2013 in order to collect upon an alleged debt
22 alleged to be owed by a third-party.

23 18. TOTH predicates said belief upon Defendant acknowledging the use of an
24 ATDS.

25 19. This ATDS has the capacity to store or produce telephone numbers to be
26 called, using a random or sequential number generator.
27
28

1 20.The telephone number Defendants called ending in 3022, was assigned to a
2 cellular telephone service for which Plaintiff incurred a charge for incoming
3 calls and texts pursuant to 47 U.S.C. § 227(b)(1).

4 21.These telephone communications constituted communications that were not
5 for emergency purposes as defined by 47 U.S.C. § 227(b)(1)(A)(i).

6 22.These telephone communications constituted telephone solicitations as
7 defined by 47 U.S.C. § 227(a)(4).

8 23.TOTH did not provide prior express consent to receive calls or messages on
9 Plaintiff's cellular telephones, pursuant to 47 U.S.C. § 227 (b)(1)(A).

10 24.These telephone communications by Defendants, or its agent, violated 47
11 U.S.C. § 227(b)(1).

12 **Calls to Plaintiff Gary Hall**

13 25.On good information and belief, Defendant began contacting HALL with an
14 automatic telephone dialing system ("ATDS") as defined by 47 U.S.C. §
15 227(a)(1) beginning in June 2013 in order to collect upon an alleged debt
16 alleged to be owed by a third-party.

17 26.HALL predicates said belief upon the long delay between Plaintiff
18 answering Defendant's telephonic communications and Defendant's
19 representative acknowledging Plaintiff.

20 27.This ATDS has the capacity to store or produce telephone numbers to be
21 called, using a random or sequential number generator.

22 28.The telephone number Defendants called was assigned to a cellular
23 telephone service for which Plaintiff incurred a charge for incoming calls
24 and texts pursuant to 47 U.S.C. § 227(b)(1).

25 29.These telephone communications constituted communications that were not
26 for emergency purposes as defined by 47 U.S.C. § 227(b)(1)(A)(i).

1 30. These telephone communications constituted telephone solicitations as
2 defined by 47 U.S.C. § 227(a)(4).

3 31. HALL did not provide prior express consent to receive calls or messages on
4 Plaintiff's cellular telephones, pursuant to 47 U.S.C. § 227 (b)(1)(A).

5 32. These telephone communications by Defendants, or its agent, violated 47
6 U.S.C. § 227(b)(1).

7 **CLASS ACTION ALLEGATIONS**

8 33. Plaintiff brings this action on behalf of himself and on behalf of and all
9 others similarly situated ("the Class").

10 34. Plaintiff represents, and is a member of the Class, consisting of all persons
11 within the United States who received an unsolicited telephonic
12 communication from Defendant wherein Defendant utilized an automatic
13 telephone dialing system ("ATDS") for non-emergency purposes, within the
14 four years prior to the filing of this action.

15 35. Defendants and its employees or agents are excluded from the Class.
16 Plaintiff does not know the number of members in the Class, but believes the
17 Class members number in the hundreds of thousands, if not more. Thus, this
18 matter should be certified as a Class action to assist in the expeditious
19 litigation of this matter.

20 36. Plaintiff and members of the Class were harmed by the acts of Defendants in
21 at least the following ways: Defendants, either directly or through its agents,
22 illegally contacted Plaintiff and the Class members via their cellular
23 telephones by using an ATDS, thereby causing Plaintiff and the Class
24 members to incur certain cellular telephone charges or reduce cellular
25 telephone time for which Plaintiff and the Class members previously paid,
26 and invading the privacy of said Plaintiff and the Class members. Plaintiff
27 and the Class members were damaged thereby.
28

1 37. This suit seeks only damages and injunctive relief for recovery of economic
2 injury on behalf of the Class, and it expressly is not intended to request any
3 recovery for personal injury and claims related thereto. Plaintiff reserves the
4 right to expand the Class definition to seek recovery on behalf of additional
5 persons as warranted as facts are learned in further investigation and
6 discovery.

7 38. The joinder of the Class members is impractical and the disposition of their
8 claims in the Class action will provide substantial benefits both to the parties
9 and to the court. The Class can be identified through Defendants' records or
10 Defendants' agents' records.

11 39. There is a well-defined community of interest in the questions of law and
12 fact involved affecting the parties to be represented. The questions of law
13 and fact to the Class predominate over questions which may affect
14 individual Class members, including the following:

- 15 a) Whether, within the four years prior to the filing of this Complaint,
16 Defendant or its agents initiated any telephonic communications to the
17 Class (other than a message made for emergency purposes or made
18 with the prior express consent of the called party) to a Class member
19 using any automatic dialing and/or SMS texting system to any
20 telephone number assigned to a cellular phone service;
- 21 b) Whether Plaintiff and the Class members were damaged thereby, and
22 the extent of damages for such violation; and
- 23 c) Whether Defendants and its agents should be enjoined from engaging
24 in such conduct in the future.

25 40. As a person that received at least one telephonic communication from
26 Defendant's ATDS without Plaintiff's prior express consent, Plaintiff is
27 asserting claims that are typical of the Class. Plaintiff will fairly and
28

1 adequately represent and protect the interests of the Class in that Plaintiff
2 has no interests antagonistic to any member of the Class.

3 41.Plaintiff and the members of the Class have all suffered irreparable harm as
4 a result of the Defendants' unlawful and wrongful conduct. Absent a class
5 action, the Class will continue to face the potential for irreparable harm. In
6 addition, these violations of law will be allowed to proceed without remedy
7 and Defendants will likely continue such illegal conduct. Because of the
8 size of the individual Class member's claims, few, if any, Class members
9 could afford to seek legal redress for the wrongs complained of herein.

10 42.Plaintiff has retained counsel experienced in handling class action claims
11 and claims involving violations of the Telephone Consumer Protection Act.

12 43.A class action is a superior method for the fair and efficient adjudication of
13 this controversy. Class-wide damages are essential to induce Defendants to
14 comply with federal and California law. The interest of Class members in
15 individually controlling the prosecution of separate claims against
16 Defendants is small because the maximum statutory damages in an
17 individual action for violation of privacy are minimal. Management of these
18 claims is likely to present significantly fewer difficulties than those
19 presented in many class claims.
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21 44.Defendant has acted on grounds generally applicable to the Class, thereby
22 making appropriate final injunctive relief and corresponding declaratory
23 relief with respect to the Class as a whole.

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FIRST CAUSE OF ACTION

NEGLIGENT VIOLATIONS OF THE TELEPHONE CONSUMER PROTECTION ACT

47 U.S.C. § 227 ET SEQ.

45. Plaintiffs incorporate by reference all of the above paragraphs of this Complaint as though fully stated herein.

46. The foregoing acts and omissions of Defendant constitutes numerous and multiple negligent violations of the TCPA, including but not limited to each and every one of the above-cited provisions of 47 U.S.C. § 227 et seq.

47. As a result of Defendant's negligent violations of 47 U.S.C. § 227 et seq, Plaintiffs and The Class are entitled to an award of \$500.00 in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B).

48. Plaintiffs and the Class are also entitled to and seek injunctive relief prohibiting such conduct in the future.

SECOND CAUSE OF ACTION

KNOWING AND/OR WILLFUL VIOLATIONS OF THE

TELEPHONE CONSUMER PROTECTION ACT

47 U.S.C. § 227 ET SEQ.

49. Plaintiffs incorporate by reference all of the above paragraphs of this Complaint as though fully stated herein.

50. The foregoing acts and omissions of Defendant constitutes numerous and multiple knowing and/or willful violations of the TCPA, including but not limited to each and every one of the above-cited provisions of 47 U.S.C. § 227 et seq.

51. As a result of Defendant's knowing and/or willful violations of 47 U.S.C. § 227 et seq, Plaintiffs and The Class are entitled to an award of \$1,500.00 in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B) and 47 U.S.C. § 227(b)(3)(C).

52. Plaintiffs and the Class are also entitled to and seek injunctive relief prohibiting such conduct in the future.

PRAYER FOR RELIEF

Wherefore, Plaintiffs respectfully request the Court grant Plaintiffs and The Class members the following relief against Defendant:

**FIRST CAUSE OF ACTION FOR NEGLIGENT VIOLATION OF
THE TCPA, 47 U.S.C. § 227 ET SEQ.**

- As a result of Defendant's negligent violations of 47 U.S.C. § 227(b)(1), Plaintiffs seek for herself and each Class member \$500.00 in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B).
- Pursuant to 47 U.S.C. § 227(b)(3)(A), injunctive relief prohibiting such conduct in the future.
- Any other relief the Court may deem just and proper.

**SECOND CAUSE OF ACTION FOR KNOWING/WILLFUL VIOLATION OF
THE TCPA, 47 U.S.C. § 227 ET SEQ.**

- As a result of Defendant's knowing and/or willful violations of 47 U.S.C. § 227(b)(1), Plaintiffs seek for herself and each Class member \$1,500.00 in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B).
- Pursuant to 47 U.S.C. § 227(b)(3)(A), injunctive relief prohibiting such conduct in the future.
- Any other relief the Court may deem just and proper.

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TRIAL BY JURY

53. Pursuant to the seventh amendment to the Constitution of the United States of America, Plaintiffs are entitled to, and demand, a trial by jury.

Dated: September 27, 2013

Respectfully submitted,

/s/ DAVID KRIEGER, ESQ.

David H. Krieger, Esq.

Nevada Bar No. 9086

HAINES & KRIEGER, LLC

8985 S. Eastern Avenue, Suite 130

Henderson, Nevada 89123

Phone: (702) 880-5554

FAX: (702) 385-5518

Email: dkrieger@hainesandkrieger.com